

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN CHARLES GODDARD

Defendant-Appellant.

UNPUBLISHED

April 8, 2003

No. 231697

Washtenaw Circuit Court

LC No. 00-000518-FC

Before: Donofrio, P.J., and Saad and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of kidnapping, MCL 750.349, for which he was sentenced to 21 to 48 months' imprisonment. We affirm.

Defendant contends that the trial court erred in denying his motion for a new trial on the ground that the verdict was against the great weight of the evidence. We review the trial court's decision for an abuse of discretion.¹ *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). The test is "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.*

We disagree with defendant's assertion that the issue in this case is "not fundamentally one of credibility." The disputed element of the kidnapping charge is whether defendant took the complainant against her will. Accordingly, the fact that defendant testified that the complainant "never at any point ever said she didn't want to go with me," while she testified, "I told him I didn't want to go," made their relative credibility crucial in determining whether the jury's conclusion that defendant's conduct satisfied that element of kidnapping was against the great weight of the evidence. In determining whether a new trial should be granted on the ground that the jury's verdict was against the great weight of the evidence, the trial judge may not sit as a "thirteenth juror" who independently evaluates the credibility of the witnesses. *People v Lemmon*, 456 Mich 625, 636-640, 647; 576 NW2d 129 (1998). The trial court may only overturn a jury's assessment of a witness' credibility in a very narrow class of circumstances, none of which was present in this case. See *id.* at 643-644. Accordingly, the trial court properly

¹ An abuse of discretion will be found only where "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

refused to grant defendant's motion on this ground.

The remaining evidence presented some indications that the complainant did not go with defendant against her will, most notably that she advised defendant not to take her to his house because the police would look for him there. However, this incident took place before defendant began demanding that the complainant tell him she loved him, squeezing her face, driving erratically, and threatening to roll the truck over. Further, although she followed defendant after he had left her with his truck and then convinced him to rejoin her, she noted that she only did so out of fear that he would harm himself with his knife. If a kidnapping victim's consent is procured by duress or threats, or is revoked during the transaction, the consent does not operate as a defense to the kidnapping charge. MCL 750.349; *People v LaPorte*, 103 Mich App 444, 448-449; 303 NW2d 222 (1981).

Here, although there was some evidence that the complainant went willingly with defendant, it does not overwhelm the evidence that defendant took her against her will. To the extent that the complainant consented to be with defendant, there was evidence that the consent was obtained through coercion, specifically, through defendant's explicit and implicit threats to harm himself and his victim. For these reasons, the trial court's refusal to grant a new trial on the basis that the verdict was against the great weight of the evidence was not an abuse of discretion. *Snider*, *supra* at 419; *McCray*, *supra* at 637.

Second, defendant contends that he was deprived of his constitutional right to effective assistance of counsel because his trial counsel failed to request the "deadlocked jury instruction," CJI2d 3.12. A successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Snider*, *supra* at 423-424. Defendant must overcome the presumption that counsel's failure to request the deadlocked jury instruction might be considered sound trial strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

Here, defendant has not overcome this presumption. As the trial court noted, the deadlocked jury instruction is sometimes perceived as favoring the prosecution. See *People v Sullivan*, 392 Mich 324, 342-343; 220 NW2d 441 (1974) (Kavanaugh, J., dissenting). Accordingly, defense counsel's failure to request it can be considered sound trial strategy. Therefore, we reject defendant's claim that trial counsel's performance was deficient. *Snider*, *supra* at 423-424.

Defendant also argues that counsel was ineffective for failing to move for a mistrial after the jury foreperson revealed that the jury was split eleven to one. Although a trial court should not ask about the numerical split of a deadlocked jury, there is no indication that a mistrial should be granted where, as here, a jury foreperson volunteers that information. See *People v Wilson*, 390 Mich 689, 691-692; 213 NW2d 193 (1973). Defendant cites no authority establishing that a mistrial should have been granted, much less that a mistrial would probably have been granted had it been requested. Accordingly, we cannot conclude that trial counsel was ineffective for failing to move for a mistrial, or that, but for trial counsel's failure to move for a mistrial, the outcome of the proceedings would have been different. *Snider*, *supra* at 423-424. Consequently, we reject defendant's challenge to the effectiveness of his trial counsel.

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Donald S. Owens